

<sup>3</sup> The Board notes that, following the October 25, 2019 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to establish disability from work for the period July 12, 2016 through September 27, 2017 causally related to his accepted employment injuries.

## **FACTUAL HISTORY**

This case has previously been before the Board on a different issue.<sup>4</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 15, 2016 appellant, then a 43-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on June 13, 2016 he sustained injury to his right knee when he stepped on a crack on a sidewalk while in the performance of duty. He stopped work on June 14, 2016. OWCP assigned the claim OWCP File No. xxxxxx036.<sup>5</sup>

Appellant filed claims for compensation (Form CA-7) alleging disability from work for the period July 29, 2016 through September 27, 2017.

Appellant submitted numerous medical reports in support of his disability claim, both in the form of narrative reports detailing physical examinations and disability reports delineating various periods of disability. Dr. Louis C. Rose, a Board-certified orthopedic surgeon, examined appellant on June 15, 2016 and advised that he was 100 percent disabled. On June 29, 2016 he indicated that appellant should be off work for six weeks. On August 9, 2016 Dr. Rose deemed appellant disabled for another six weeks and on September 20, 2016 he found him disabled for another four weeks.

Dr. Rose continued to treat appellant and indicated that he was disabled from work. In reports dated between late-2016 and mid-2017, he provided physical examination findings, reviewed diagnostic testing, detailed his medical treatment, and diagnosed multiple lower extremity conditions. Dr. Rose also provided disability notes, dated between late-2016 and mid-2017, in which he recommended work stoppages generally ranging from four to six weeks from the date of each note.

On January 19, 2017 Dr. Joshua Macht, a Board-certified internist, recounted appellant's work injuries and detailed the findings of his physical examination. He diagnosed bilateral knee sprains, noting that on June 13, 2016 appellant sustained a new right knee injury and aggravated his prior left knee injury. Dr. Macht opined that appellant's knee injuries prevented him from

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<sup>4</sup> Docket No. 17-1998 (issued March 5, 2018).

<sup>5</sup> Appellant has a prior claim for a December 17, 2007 traumatic injury, assigned OWCP File No. xxxxxx714, which OWCP accepted for internal derangement of the left knee and other disorders of the synovium, tendon, and bursa. He underwent OWCP-authorized left knee surgery on August 28, 2008 and February 18, 2010. The record also indicates that appellant has a prior occupational disease claim, assigned OWCP File No. xxxxxx288, which was denied because the evidence was not sufficient to establish that the injury occurred as described. OWCP administratively combined the case files for OWCP File Nos. xxxxxx036, xxxxxx288, and xxxxxx714, with the latter serving as the master file.

returning to his carrier technician job because he could not engage in prolonged standing, walking, and climbing.

On May 14, 2018 OWCP accepted appellant's claim for bilateral knee strains.

On May 16, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and series of questions, for a second opinion examination and evaluation with Dr. Willie E. Thompson, a Board-certified orthopedic surgeon. It requested that he provide an opinion regarding whether appellant continued to have residuals or disability due to the accepted employment injury. In a June 4, 2018 report, Dr. Thompson discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted, upon examination of the lower extremities, findings of full range of motion of the knees, no tenderness to palpation, no joint effusion, and normal strength. Appellant's Lachman and McMurray tests were found to be negative and there was no evidence of collateral ligamentous laxity. Dr. Thompson diagnosed status postarthroscopic surgeries to the left knee and noted that appellant suffered a right knee sprain on June 13, 2016. He opined that he did not see "objective evidence of any ongoing pathology to the right and left knees" and indicated that there was no indication for future medical treatment. In a June 4, 2018 work capacity evaluation (Form OWCP-5c), Dr. Thompson indicated that appellant had no work restrictions.

In an August 1, 2018 report, Dr. Ira D. Gelb, an attending Board-certified orthopedic surgeon, reported physical examination findings and diagnosed unilateral primary osteoarthritis of both knees and possible loose body in the left knee.

By decision dated September 10, 2018, OWCP denied appellant's disability claim, finding that he had not submitted sufficient medical evidence to establish work-related disability for the period commencing July 29, 2016.

On October 18, 2018 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. Prior to the hearing, OWCP's hearing representative conducted a preliminary review and issued a February 1, 2019 decision vacating the September 10, 2018 decision and remanding the case to OWCP for further development. The hearing representative found that appellant was actually claiming disability from work for the period June 13, 2016 through September 27, 2017, rather than the period July 29, 2016 through September 27, 2017, because appellant's continuation of pay claim had been denied for the period June 14 through July 28, 2016. OWCP's hearing representative determined that the June 4, 2018 report of Dr. Thompson was in need of clarification regarding when work-related residuals ceased and that, on remand, Dr. Thompson should be asked to provide an opinion regarding whether appellant was disabled from work for the period June 14, 2016 through September 27, 2017 causally related to appellant's accepted employment injury.

On remand OWCP requested that Dr. Thompson review appellant's medical records, particularly those produced from June 13, 2016 through September 2017, and provide a supplemental opinion clarifying whether appellant had work-related disability for the period June 13, 2016 through September 27, 2017. It noted that Dr. Rose had not indicated when appellant's disability ceased and that Dr. Macht had opined that appellant was unable to engage in prolonged standing, walking, and climbing. OWCP further advised that appellant's job in June 2016 had required walking for two hours per day, standing for two hours, and climbing for two to four hours.

In a February 21, 2019 supplemental report, Dr. Thompson provided a summary of the medical evidence of record. He indicated that on June 13, 2016 appellant could not have suffered anything more than a sprain to his right knee as a result of stepping in a crack on a sidewalk. Dr. Thompson noted, “In my opinion, [appellant] would have required no more than 3 to 4 weeks of rest, modification of activities, and possibly a brief course of physical therapy before returning to work. [Appellant] certainly could have returned to work in the modified position as a modified-duty carrier technician 3 to 4 weeks after the injury.” He opined that, if appellant had been out of work for a longer period, such work stoppage was “not indicated.” Dr. Thompson noted, “Simply stepping in a crack on a sidewalk does not require anything more than a brief period of time to rehabilitate the knee.”

By decision dated March 27, 2019, OWCP denied appellant’s disability claim, finding that he had not submitted sufficient medical evidence to establish work-related disability for the claimed period. It found that the opinion of Dr. Thompson demonstrated that appellant did not have such disability.

On April 23, 2019 appellant requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review. During the August 12, 2019 telephonic hearing, he argued that the reports of his attending physicians supported that he had work-related disability through September 2017.

By decision dated October 25, 2019, OWCP’s hearing representative found that appellant had established entitlement to compensation benefits for the period June 14 through July 11, 2016. However, the claim remained denied as the medical evidence of record was insufficient to establish employment-related disability for the period July 12, 2016 through September 27, 2017. The hearing representative determined that the June 4, 2018 and February 21, 2019 reports of Dr. Thompson justified the denial of appellant’s disability claim for the period July 12, 2016 through September 27, 2017.<sup>6</sup> It was determined that the reports of attending physicians, including Dr. Rose and Dr. Macht, did not establish appellant’s disability claim for that period. The hearing representative therefore affirmed the March 27, 2019 decision, as modified.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>7</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>8</sup> Whether a particular injury causes an

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<sup>6</sup> The hearing representative noted that Dr. Thompson had indicated in his February 21, 2019 report that appellant could have returned to work as a carrier technician three to four weeks after the June 13, 2016 employment injury.

<sup>7</sup> *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>8</sup> *See M.B.*, Docket No. 18-1455 (issued March 11, 2019); *D.W.*, Docket No. 18-0644 (issued November 15, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.<sup>9</sup>

Under FECA the term “disability” means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>10</sup> Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>11</sup> An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.<sup>12</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.<sup>13</sup>

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.<sup>14</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

In his June 4, 2018 report, Dr. Thompson noted that he did not see “objective evidence of any ongoing pathology to the right and left knees” and opined that there was no indication for future treatment. In his February 21, 2019 report, he concluded that appellant would not have been disabled from appellant’s modified carrier technician position for more than three or four weeks after the June 13, 2016 employment injury. The Board finds that Dr. Thompson did not adequately explain how his opinion on disability was supported by objective medical findings, particularly given that appellant’s attending physicians found limitations of certain activities, including standing, walking, and climbing, more than three or four weeks after June 13, 2016.

The Board has held that, while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>15</sup> Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so

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<sup>9</sup> See 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

<sup>10</sup> *Id.* at § 10.5(f).

<sup>11</sup> See *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

<sup>12</sup> See *K.H.*, Docket No. 19-1635 (issued March 5, 2020).

<sup>13</sup> See *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

<sup>14</sup> *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

<sup>15</sup> See *D.V.*, Docket No. 17-1590 (issued December 12, 2018); *Russell F. Polhemus*, 32 ECAB 1066 (1981).

in the proper manner.<sup>16</sup> Once OWCP starts to procure medical opinion, it must do a complete job in securing from its referral physician an opinion which adequately addresses the relevant issues.<sup>17</sup>

Therefore, the Board finds that the case must be remanded for a rationalized opinion from Dr. Thompson as to whether appellant had disability from work during the period July 12, 2016 through September 27, 2017 causally related to appellant's accepted employment injury. If he is unable to clarify or elaborate on his previous reports, or if the supplemental report is also vague, speculative, or lacking rationale, OWCP must submit the case record and an updated SOAF to a new second opinion physician for the purpose of obtaining a rationalized medical opinion on the issue.<sup>18</sup> After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>16</sup> See *A.K.*, Docket No. 18-0462 (issued June 19, 2018); *Robert F. Hart*, 36 ECAB 186 (1984).

<sup>17</sup> *T.B.*, Docket No. 20-0182 (issued April 23, 2021); *L.V.*, Docket No. 17-1260 (issued August 1, 2018); *Mae Z Hackett*, 34 ECAB 1421, 1426 (1983).

<sup>18</sup> *J.H.*, Docket No. 19-1476 (issued March 23, 2021); *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Talmadge Miller*, 47 ECAB 673 (1996).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 25, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: May 5, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board